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In the Supreme Court of the United States

OCTOBER TERM, 1935

No. 335

GEORGE NOBLE AND WILLIAM NOBLE,
Petitioners,

vs.

THE CITY OF OKLAHOMA CITY, A Municipal Corporation,

No. 336

ROBERT W. HIGGINS, Jr., JOHN T. HIGGINS, RALEIGH E. HIGGINS, BURFORD C. HIGGINS, ESTELLA JONES Nee HIGGINS, CASS W. HIGGINS, An Insane Person, by JACK JONES, His Next Friend and Duly Appointed, Qualified And Acting Legal Guardian, EVA H. McMILLAN, FAIRY ADKINS, GERTRUDE KOELSCH Nee HIGGINS, and NELLIE SHANNON, Nee HIGGINS,
Petitioners,

vs.

THE CITY OF OKLAHOMA CITY, A Municipal Corporation.

Response to Petition for Writs of Certiorari

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ROBERT W. HIGGINS, Jr., JOHN T. HIGGINS, RALEIGH E. HIGGINS, BURFORD C. HIGGINS, ESTELLA JONES Nee HIGGINS, CASS W. HIGGINS, An Insane Person, by JACK JONES, His Next Friend and Duly Appointed, Qualified And Acting Legal Guardian, EVA H. McMILLAN, FAIRY ADKINS, GERTRUDE KOELSCH Nee HIGGINS, and NELLIE SHANNON, Nee HIGGINS,

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THE CITY OF OKLAHOMA CITY, A Municipal Corporation.

Response to Petition for Writs of Certiorari

A

We believe the petitioners in their "Summary Statement of the Matter Involved" set forth a great many im-

material facts. In some instances they did not make as full disclosure of the facts as should be made in order for the court to understand the controlling issues in the cases. Furthermore, there are many conclusions stated which we do not believe are justified by the record. However, we shall not attempt to re-state the facts but shall only call attention to additional facts which in our judgment should be stated.

At page 3 of the petition it is stated that the United States conveyed "the fee title" to certain lands involved in these suits, to the Creek Indians. Respondent desires to make it clear that this conveyance does not purport to give the Creek Indians the absolute fee simple title to the land. The language of the patent is as follows:

> "To have and to hold the same unto the said Tribe of Indians so long as they shall exist as a Nation and continue to occupy the Country hereby conveyed to them." (R. 136 and C. M. 469 Noble)

At page 4 of the petition it is stated that Congress in approving the *Creek Treaty of Jan.* 19, 1889, by Act of March 1, 1889, 25 *Stats.* 757, provided:

> "That the lands acquired by the United States under said Agreement shall be a part of the public Domain."

In this connection attention is called to the fact that Congress, on the very next day, to-wit, March 2, 1889, passed an Act appropriating money to pay the Creek and Seminole Indians for all their claim and also providing for the opening of the Country to White settlement by the *Proclamation of the President of the United States.* (25 *Stats.* 1003)

Said Act of March 2, 1889, among other things provided:

"* * * but such release and conveyance, and extinguishment shall not inure to the benefit of or cause to invest in any railroad company any right, title, or interest whatever in or to any of said lands, and all laws and parts of laws so far as they conflict with the foregoing, are hereby repealed, and all grants or pretended grants of said lands and interest or right therein now existing in or on behalf of any railroad company, *except rights of way and depot grounds, are hereby declared to be forever forfeited for breach of conditions.*" (Italics supplied)

Pursuant to said Act of Congress, the President of the United States on March 23, 1889, issued his Proclamation opening the Country to settlement under the Homestead laws of the United States at the hour of twelve o'clock noon, on April 22nd, 1889. 25 *Stats.* 1544, 1 *Kapp. 2nd Ed.* 940. Said Proclamation declared among other things that:

"* * * it will at and after the hour of twelve o'clock noon of the 22nd day of April, next, and not before, be open for settlement under the terms and subject to *all the conditions, limitations and restrictions contained in said Act of Congress, approved March* 2, 1889 *and the laws of the United States applicable* thereto." (Italics supplied)

On May 2, 1890, Congress passed an Act organizing the territory of Oklahoma. 26 *Stats.* 81. This Organic Act, among other things, contained the following provision:

"No part of the land embraced within the territory created shall inure to the use or benefit of any railroad company, *except the right-of-way and lands for station grounds heretofore granted to certain corporations.*" (Italics supplied)

At page 5 of the petition it is stated that the land in-

volved in these suits was included in the Western half of the lands of the Creek Nation ceded to the United States, and then petitioners set forth the Acts of Congress relating to the construction of the line of railroad by the Choctaw Coal and Railway Company. Respondent believes that it is important that attention should be called to some other things which had preceded the right-of-way grants.

In *Art.* 20 *of the Treaty between the United States and the Creek and Seminole Tribes,* dated August 7th, 1856, 11 *Stats.* 699, 2 *Kapp. 2nd. Ed.* 756, it was provided:

> "The United States, or any incorporated company shall have the right-of-way for railroads or lines of telegraph through the Creek and Seminole Country."

And the Treaty in substance further provides that in case the right-of-way is granted to a corporation, the corporation shall be required to pay the Indian Tribe through whose land the right-of-way is granted and for all damages done to the holdings of the individual occupants of such land, according to the laws, customs and usages of such tribe by the encroachment of such right-of-way upon such holdings.

Moreover, it was provided in the said Treaty that was entered into with the Creek Tribe June 14, 1866, 14 *Stats.* 785, 1 *Kapp.* (*2nd Ed.*) 931, that Congress should have the right to grant rights-of-way to railroad companies through the said Creek country.

After the title to the Western portion of what is now Oklahoma was acquired from the Creek Indians by the United States June 14, 1866 (14 *Stats.* 785, 1 *Kapp.* (*2nd Ed.*) 931 R. 53) "to be sold to and used as homes for such other civilized Indians as United States may choose to settle thereon", the United States never sold the land

to any Indians nor did they ever permit any Indians to settle upon the land in the immediate vicinity of what is now Oklahoma City. This land, like a great many other tracts in Western Oklahoma, remained absolutely vacant and unoccupied from the time the United States obtained it in 1866, until April 22nd, 1889. Moreover, no person during this period of time, not even Indians, had a right to occupy the land.

Inasmuch as the United States had purchased the land from the Creek Indians in 1866 for the purpose of disposing of it to other Indians, and it had developed that all of the land was not needed for that particular purpose, Congress on March 3, 1885, (23 *Stats.* 362) passed an Act authorizing negotiations with the Creek Indians to release all restrictions on the United States as to the use of the land so that the United States could open it for White settlement. This situation resulted in the *Creek Treaty* dated Jan. 19, 1889, which released all claim of the Creek Indians and removed all restrictions as to the use. And the desire to open this unoccupied Country to White settlement, together with the desire to develop that portion of the Country occupied by Indians, doubtless resulted in the passage of the *Choctaw Coal & Railway Company Act of February* 13, 1889, referred to at pages 5 and 6 in the petition. The line of road described in the Act was to begin at a place near what is now Hartshorne or Haileyville, in Eastern Oklahoma, and extend to what is now Goodwin in Ellis County, located in the extreme western portion of what is now the State of Oklahoma.

At page 7 of the petition it is stated that the ancestors of petitioners in the Noble case, staked and occupied lot 6 in Block 36 in the townsite of Oklahoma City, the North 40 feet of which is involved in this litigation. In

this connection, respondent believes that there are some further facts which might be important:

At the time the ancestors of petitioners settled upon the lot in question the right-of-way of the Choctaw Coal and Railway Company was then staked out across the identical forty feet involved in the Noble suit. And it will be remembered that this forty feet is all that is involved in the Noble case. In addition to stakes being placed along the center of the right-of-way, there were also warning signs on the right-of-way, showing that it was claimed for right-of-way and station ground purposes. (R. page 97, 98, 113) This entire forty feet of land was also included in the first map showing the temporary location of the line of railroad (R. 90-B).

Petitioners state at page 12 of their petition that it was conceded at the trials in the State Court that upon abandonment of the land by the railroad company the land reverted either to the United States or to petitioners through their predecessors in title. Petitioners are in error in this statement, insofar as it relates to the Higgins case. Respondent throughout this litigation has always contended that neither Higgins nor Noble ever had any interest in the strip of land over which the line of railroad was constructed, because the Choctaw Coal & Railway Company was granted this right-of-way before the passage of the Act of March 2, 1889, which authorized the opening of this Country to White settlement, but respondent has also contended that even if it should be held that it is in error in this contention, still the deed (R. 152) executed by R. W. Higgins and his wife, to the Railroad Company, conveyed the absolute fee simple title to the Railroad Company and that the Railroad Company conveyed that title to the respondent.

We shall subsequently discuss this point at length.

B

Petitioners set forth on pages 15 to 19 inclusive of their petition, the "reasons relied on for the allowance of the writs." Respondent will hereinafter discuss these assigned reasons in its Answer to Petitioners' Brief.

ARGUMENT AND AUTHORITIES

Preliminary to our discussion of the Propositions discussed in petitioners' brief, we desire to submit a question which is applicable only to the Higgins case.

There was a non federal question in the Higgins case which is sufficient to sustain the decision of the Supreme Court of the State of Oklahoma and this Court has no power to disturb the decision.

The deed made by R. W. Higgins and wife, ancestors of petitioners, to the railroad company conveyed the absolute fee simple title to the railroad company. The railroad company in turn conveyed that title to the respondent. The Supreme Court of the State of Oklahoma did not discuss the point in its opinion, although it was briefed and argued. It will be remembered that the Noble and the Higgins cases were consolidated in the State Supreme Court and it will be observed that after the Supreme Court decided in favor of respondent on the Federal questions which involved the Congressional Acts, it did not discuss the non federal questions which was applicable to the Higgins case alone. However, on the same day the opinions in the consolidated cases were rendered by the State Supreme Court, it decided a companion case which involved a right-of-way deed which was executed prior to the time Oklahoma became a state and the Court in that case held that under the laws of Oklahoma Territory, which were in force at the time of the execution of the deed, the railroad company acquired the fee simple title to its right-of-way, and that said title was conveyed to the respondent by the railway company. The companion case mentioned is *Oklahoma*

City v. *Dobbins,* not yet officially published, but published in 44 P. (2d) 148.

As a matter of explanation, attention is called to the fact that in the downtown business section of Oklahoma City there were two lines of railroad. One was the line of the St. Louis & San Francisco Railway Company, commonly called "the Frisco" and the other was the line of Chicago, Rock Island & Pacific Railway Company, commonly called "the Rock Island." The rights-of-way and properties of these railroads were adjoining and their lines of railroad ran parallel to each other part of the way through the City. The Rock Island, which was a lessee of the Choctaw, Oklahoma & Gulf Railroad Company, a successor to the Choctaw Coal & Railway Company, claimed title to its right-of-way by and through the Acts of Congress involved in this litigation. The Frisco Railroad Company acquired its right of way generally by deeds and in some cases, by condemnation. And before these railroad companies would vacate these rights-of-way the respondents had to agree to purchase the rights-of-way. Inasmuch as these different railroad properties were adjoining there is involved in some of these suits pending in the State Courts, a portion of the Rock Island right-of-way and a portion of the Frisco right-of-way and the companion case above referred to and cited, involved the questions applicable to both situations. We are confident that the only reason the Supreme Court did not discuss the non federal question in the Higgins Case predicated on the deed, was due to the fact that it had held against the petitioners on the questions that were common to both cases and the court doubtless considered it unnecessary to deal with the same question involved in the companion case, and which had

just been decided. A part of the syllabus of the *Dobbins Case* is as follows:

> "Prior to statehood, under the statutory provisions existing in the territory of Oklahoma, a railroad corporation was vested with authority to acquire, own, and hold the fee simple title to real estate voluntarily conveyed to it."

It is now the settled law by the Supreme Court of the State of Oklahoma that a deed executed to a Railroad Company for right-of-way purposes, prior to statehood, conveyed to the railroad company the fee simple title to the land and that the railroad company has the right to sell the land just as an individual who purchases land.

In *Marland* v. *Gillespie*, 168 Okla. 376, 33 Pac. (2d) 207, the Supreme Court of Oklahoma had under consideration a deed which in many respects is very similar to the Higgins deed and the Court announced the law in the syllabus prepared by the Court as follows:

> "A deed from a grantor to a railway company containing the sentence 'The same being for a right of way for a railroad track as the survey thereof is now located and said grantee agrees to construct two grade crossings over its track for the use of grantor, and proper water ways under its track where there is heavy fills,' but not otherwise limited, conveys a fee-simple title; such sentence not being a limitation upon the quality of the estate conveyed."

Inasmuch as petitioners in their petition herein erroneously stated respondent's position in the State Courts, we shall quote verbatim what we said in our printed brief filed with the State Supreme Court. In quoting from this brief it will be remembered that the two Oklahoma cases hereinbefore cited had not been decided at

the time the brief was written. Respondent's brief on the point was as follows:

"EIGHTH PROPOSITION

"The Higgins deed conveyed to the Choctaw, Oklahoma & Gulf Railroad Company the absolute fee simple title to the land involved in the Higgins case; and said railroad company by its deed conveyed said title to the defendant, the City of Oklahoma City, which now owns said property.

"In making argument in support of this proposition, we trust that it will be remembered, that we have the greatest confidence in the soundness of our position on all the points hereinbefore discussed. We do not consider that any of the plaintiffs in the consolidated cases herein discussed have any vestige of title to any of the property involved; nor do we believe, that their predecessors in interest ever had any title to any part of the land. Moreover, we believe this Court will reach a conclusion on the controlling issues in these cases, long before it reaches this point of our brief.

"But, as has been hereinbefore incidentally shown, on March 24, 1898, R. W. Higgins and his wife, after he had received a patent from the United States for the quarter section of land, which includes the land involved in the Higgins suit, conveyed the said land, to the Choctaw, Oklahoma & Gulf Rail Road Company, which as the Court will remember, had succeeded to the rights of the Choctaw Coal & Railway Company, by virtue of a decree of the United States Court in a receivership proceeding; and by an Act of Congress passed in 1896.

"The Higgins deed was absolute and without any reservation and is set out in full at page 158, case-made Higgins. This deed is different from the one

involved in the Noble case, in that the Noble deed, as has been hereinbefore shown, *contained a reversionary clause.*

"After the Higgins deed was executed and delivered to the railroad company, that company and the Chicago, Rock Island & Pacific Railway Company held and used the land until said railroad companies on December 4, 1928, conveyed the land by deed to the City of Oklahoma City. That deed of conveyance appears at page 174 of case-made, Higgins.

"We tak the position that, if all the Congressional legislation which we have heretofore discussed, were entirely eliminated insofar as this case is concerned, the City would still have a valid fee simple title to the land involved in the Higgins case. This is true, because at the time R. W. Higgins and his wife executed the deed to the railway company, on the 24th day of March, 1898, the railroad company, under the laws, as they then existed, had the right to take an absolute fee simple title to land and, even if it should be held that the law since that time had been changed, still that would not defeat the title that the railroad company took by the Higgins deed. And most certainly, such a change in the law, if one has been effected, could not serve to reinvest the title in Higgins and his wife, or their heirs.

"Inasmuch as we have thoroughly presented this question of law in a brief which we have filed in the case of C. E. Dobbins, et al. v. The City of Oklahoma City, a companion case, now pending in this Court, as No. 24343, we shall not here undertake to present fully our views on this question. However, we shall here cite without comment, some of the authorities which we believe are absolutely controlling and fully sustain the correctness of this proposition.

Gilbert v. *M. K. & T. Ry. Co.*, 185 Fed. 102;
Section 1051, *Okla. Ter. Stats. of* 1890, the same being Sec. 11928 *O. S.* 1931;
Section 1052, *Okla. Ter. Stats.* 1890, the same being Sec. 11929, *O. S.* 1931;
Section 1053, *Okla. Ter. Stats,* 1890, the same being Sec. 11930, *O. S.* 1931;
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M. K. & T. Ry. Co. v. *City of Tulsa,* 45 Okla. 382, 145 Pac. 398;
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Okla. Ry. Co. v. *Severns Pav. Co.,* 251 U. S. 104, 41 Sup. Ct. 73, 64 L. Ed. 168;
Coats & Hopkins Realty Co. v. *K. C. T. Ry. Co.,* 43 S. W. (2d) 817;
Kynerd v. *Hulen,* 5 Fed. (2d) 160;
Buckley v. *Morton,* 93 Okla. 45, 219 Pac. 685."

The Higgins deed it will be observed, not only was a conveyance to the Railroad Company, but it contained a release of damages. It will be remembered that at the time the railroad was constructed in 1890 or 1891, R. W. Higgins was having trouble before the Secretary of the Interior as to his right to homestead the Quarter Section of land, and this question was not fully settled before 1896; so when the deed was executed in 1898 it also contained provisions relating to damages, which were claimed prior thereto. But stripped of the phraseology relating to damages, the deed purports to be an absolute conveyance of a fee simple title to the railroad company and is very similar to the deed which was involved in *Marland* v. *Gillespie,* 168 Okla. 376, supra.

It being the settled law of the State of Oklahoma that before Statehood railroad companies which acquired their rights of way by deed took the absolute fee simple title thereto with the full right to convey the same, we believe in this case that it could serve no purpose for the Court to issue the writ prayed for.

In this connection, we call the court's attention to the following cases:

In *Browne* v. *Union Pacific Railroad Company*, 267 U. S. 255, 69 L. Ed. 601, the court said:

> "It is well settled that where the supreme court of a state decides a federal question in rendering a judgment, and also decides against the plaintiff in error upon an independent ground not involving a Federal question and broad enough to maintain the judgment, the writ of error will be dismissed without considering the Federal question." Hammond v. Johnston, 142 U. S. 73, 35 L. Ed. 941, 942, 12 Sup. Ct. Rep. 141; Enterprise Irrig. Dist. v. Farmers Mut. Canal Co., 243 U. S. 157, 164, 61 L. Ed. 644, 648, 37 Sup. Ct. Rep. 318.

In *Hammond* v. *Johnston*, 142 U. S. 73, 35 L. Ed. 941, the law is stated in the syllabus as follows:

> "Where the Supreme Court of a State decides a federal question in rendering a judgment, and also decides against the plaintiff in error upon an independent ground not involving a federal question and broad enough to maintain the judgment, the writ of error will be dismissed without considering the federal question."

In *Enterprise Irrigation District* v. *Farmers Mutual Canal Co.*, 243 U. S. 157, 61 L. Ed. 644, the court stated the law as follows:

> "Our jurisdiction is disputed and must be con-

sidered, as, indeed it should be, even if not challenged. As has been shown, several questions were presented to the Supreme Court and all were considered. One was whether the state board's decision could be given any conclusive effect consistently with the due process and equal protection clauses of the 14th Amendment, and another was whether the defense of estoppel in pais was well grounded. The first was plainly a federal question and the other as plainly non-federal. Both were resolved in favor of the canal company. The other questions, none of which was federal, may be put out of view in this connection. Thus we are concerned with a judgment placed upon two grounds, one involving a Federal question and the other not. *In such situations our jurisdiction is tested by inquiring whether the non-Federal ground is independent of the other broad enough to sustain the judgment.* Where this is the case, the judgment does not depend upon the decision of any Federal question and we have no power to disturb it." (Italics supplied).

In *Waters-Pierce Oil Company* v. *State of Texas,* 212 U. S. 112, 53 L. Ed. 431, the Court said:

> "It is well settled in this court, that where a state court decides a case upon an independent ground not within the Federal objections taken, and that ground is sufficient to maintain the judgment, this court will not review the case."

In *Leathe* v. *Thomas,* 207 U. S. 93, 52 L. Ed. 118, the Court states the law as follows:

> "The judgment purported to be based upon the referee's report, and it may be that, if it were our concern to deal with it, we should find it hard to discover sufficient warrant for a judgment on the first or second pleas. * * * But on the most favorable statement that we can make on the side of the

plaintiff in error we can see no ground for coming to this court.

"It is admitted that the general and well-settled rule is that in a case coming from a state court this court can consider only Federal questions, and that it cannot entertain the case unless the decision was against the plaintiff in error upon those questions, (Citing cases). It is admitted further, *that a decision upon those questions must have been necessary to the decision of the case, so that, if the judgment complained of is supported also upon other and independent grounds, the judgment must be affirmed or the writ of error dismissed,* as the case may be. Murdock v. Memphis, supra. But Murdock v. Memphis does not stop there. It further establishes that when the record discloses such other and completely adequate grounds this court commonly does not inquire whether the decision upon them was or was not correct, or reach a Federal question by determining that they ought not to have been held to warrant the result." (Italics supplied.)

Where the action of the State Supreme Court can be sustained upon a non-federal question, even if the court held against the federal question, the Supreme Court of the United States will not disturb the decision, regardless of what the State Court said on the federal question.

Sec. 648 *Rose Fed. Juris. and Proc.*, page 570.

FIRST PROPOSITION

The Act of Congress of Feb. 18, 1888 as amended by the Act of Feb. 13, 1889, was a grant in praesenti of a right of way to the Choctaw Coal and Railway Company.

At page 30 of the Petitioners' brief they take the opposite view from that expressed in the above proposition.

Notwithstanding that the Opinions of the Supreme Court of the State of Oklahoma in these cases are under attack herein, we believe no more conclusive argument showing the erroneous position of petitioners' could be produced than the Opinions. The Opinions show themselves that the Court not only fully understood the facts, but that it was thoroughly familiar with the Federal decisions dealing with Special Congressional Right-of-way Grants. And the decisions of the State Supreme Court are in harmony with all of the Federal decisions on the question.

In attempting to construe the Acts of Congress involved petitioners seek to place a construction upon the Act which we believe is too narrow; and they assume as a predicate for their reasoning, conditions and situations which did not obtain at the time. It will be observed from page 31 of their brief that petitioners attempt to make a point out of the fact that the word "grant" was not used in the Title of the Act, nor in section 2 thereof. And they assign as one of the reasons why the word "grant" was not used is because the land over which the line of railroad was to be built was owned "in fee simple" by the Indian tribes. To predicate an argument upon the assumption that the title to the land belonged in fee simple to the Indian Tribes is unwarranted.

It will be remembered that by the Treaty of 1856, with the Creeks and the Seminoles, the United States were given the right to grant railroad rights of way through the Creek and Seminole Country. This same right was preserved to the United States by the Treaty

of 1866. The only limitation which was placed upon the powers of Congress to grant rights of way absolutely, through the Creek and Seminole Country, was that when the railroad right of way was granted to a corporation Congress should require the corporation to pay the Indian Tribe through whose land the right of way was granted and for all damages done to the holdings of the individual occupants of such land, according to the laws, customs and usages of such tribe, by the encroachment of such right of way upon such holdings.

It will also be remembered that the right of way which was granted by the Act of Feb. 13, 1889, extended from a place near Hartshorne or Haileyville, in what is now Eastern Oklahoma, to a place what is now Goodwin, in Ellis County, Oklahoma, which is in the extreme Western portion of the State of Oklahoma. Congress in granting the right-of-way must have known that there were at least three different situations relating to title which would be encountered in constructing a line of railroad from Haileyville in eastern Oklahoma to Goodwin, in the extreme western part of the State, to-wit:

1st. Some of the land over which such a railroad would be constructed belonged to the Indian Tribes with a possibility of reverter to the United States, in case the Indian Tribes ceased or abandoned the country; and

2nd. Even in case the land really belonged to the Indian Tribe, as set forth in the next preceding paragraph, occasionally there would be encountered improvements of individual occupants of such land, according to the laws, customs and usages of such Tribe; and

3rd. Land which belonged to the United States, which was absolutely unoccupied as the land in and about the City of Oklahoma City. This land, it will be remem-

bered, had been owned by the United States and had been absolutely unoccupied since the United States purchased it from the Creek Tribe by the Treaty of June 14, 1866. 14 *Stats.* 785.

It is elementary that the Congress of the United States has the absolute power to dispose of the lands which belong to the United States as it sees fit and proper. *Ruddy v. Rossi,* 248 U. S. 104, 39 Sup. Ct. 46, 63 L. Ed. 148.

During the period from 1850 to 1890, the Congress of the United States had granted right-of-way after right-of-way to railroad companies and virtually all of these rights-of-way insofar as they affected lands which belonged to the United States, had been given absolutely free to the railroad companies. That doubtless was the very thing that Congress intended in the Acts now under consideration.

Congress, by Treaty with the Indians had the right to grant the right-of-way over the Indian land, but the Treaty provided that the Indians should be paid for the land and it will be observed from the Acts now under consideration that they made ample provision for the protection of Indian rights; but they did not make provision for compensating any other persons. In fact, it was not intended that any other persons should be compensated. We believe that, when the facts, circumstances and conditions are all taken into consideration, there can be no escape from the conclusion that the Congress of the United States granted to the Choctaw Coal & Railway Company a free right-of-way to take effect in praesenti insofar as the right-of-way affected the property rights of the United States; and wherever the right-of-way affected Indian rights the Indians of course, had to be compensated for any damages which they sustained.

It is true that the word "Grant" is not used in the

title of the Act nor in Section 2 thereof, but the title of the Act and Section 2 thereof contains language very applicable to the situation which then obtained. It will be observed that it used the phrase "to take and use a strip" and we believe that Congress by using the words "to take and use" made use of language which under the peculiar circumstances was stronger and more effective for the purpose of granting a title to the right of way in praesenti than if Congress had just used the word "grant."

Petitioners insist that the Act only gave the Railroad Company the right to acquire by condemnation. In *Wulzen* v. *Board of Supervisors* (Cal.) 35 Pac. 353, 356, the court in defining the meaning of the phrases "to acquire" and "to take" used the following language:

> "'To acquire' is, in the law of contracts and descents, to become the owner of property; to make property ones own. 'To take' signifies 'to lay hold of', and when applied to lands, implies 'to gain or receive into possession;' to seize; to deprive one of the possession, to assume ownership."

It seems to us that the above explanation of the terms "to acquire" and "to take" is sufficient to show that Congress intended then and there to give the railway company the right-of-way and station grounds outright in praesenti, subject, of course, to the Indian rights for which the railway company was required to pay compensation.

This view is strongly corroborated by Section 10 of said Act, which is in part as follows:

> "That the said Choctaw Coal & Railway Company shall accept this right-of-way upon the express condition, binding upon itself, its successors and assigns, that they will neither aid, advise nor

assist in any effort looking toward the changing or extinguishing the present tenure of the Indians in the land and will not attempt to secure from the Indian Nations *any further grant of land* or its occupancy, than is hereinbefore provided." (Italics supplied).

The use of the expression "further grant of land" certainly must be considered as congressional interpretation of the Act that there was a present grant by the Act itself.

And in Section 13, we have the following language:

> "That the right-of-way *herein and hereby granted* shall not be assigned or transferred in any form whatever prior to the construction and completion of the road," etc. (Italics supplied).

We cannot conceive of stronger language than that just quoted.

If Congress did not intend to grant the right-of-way to take effect in praesenti, why did it use the words: "herein and hereby granted" in that part of the Act which prohibited the railway company from selling the right-of-way before the line of road was constructed?

This view of the Act is also strongly supported by *Mackey, County Treasurer*, v. *Choctaw O. & G. R. Co.*, 261 Fed. 342, decided by the Circuit Court of Appeals for the Eighth Circuit, October 14, 1919. This identical Choctaw Coal & Railway Company Act and the character of title granted thereby, were before the court in that case. It will be observed from a reading of the case, that the court spoke of the right-of-way as one "granted by Congress in praesenti" and treated it as the same character of title that was granted under other special railroad right-of-way grants and cited several cases based upon other right-of-way grants by Congress, about which

there can be no controversy as to the title being granted in praesenti, for the basis of the court's decision.

This *Mackey case* was appealed to the Supreme Court of the United States and the decision of that court is reported in 256 U. S. 531, 65 L. Ed. 1076, 41 Sup. Ct. 582.

From a reading of that decision it will be noticed that the Act was treated by the Supreme Court of the United States as one granting a right-of-way to the Choctaw Coal & Railway Company. The beginning of the second syllabus is as follows:

> "The right-of-way and station grounds of a railroad in Oklahoma *which were* granted by Congress," (Italics supplied).

And in discussing the character of title that the railway company took under the Act, the court treated the title as being of the precise character as the title to rights-of-way granted railroad companies by other special Acts over the public lands.

It will be remembered in considering the Mackey case supra, that Holdenville, Oklahoma, is in the Eastern portion of the Creek Nation and that portion of the State is not embraced in the lands ceded to the United States in the Treaty of June 14, 1866.

The Supreme Court of the Territory of Oklahoma, in *Churchill* v. *Choctaw Railroad Company*, 4 Okla. 462, 46 Pac. 503, had before it for interpretation the same Act of Congress which is involved in the instant cases and it held that said Act was a present absolute grant of right-of-way to the Choctaw Coal & Railway Company and it will be remembered that the land involved in the last cited case was only a short distance west of the tracts of land involved in the instant cases. The ter-

ritorial Supreme Court also made the same holding in *U. S.* v. *Choctaw, Oklahoma & Gulf R. R. Co.*, 3 Okla. 404, 41 Pac. 729.

It is not necessary that Congressional grants contain technical words of grant; it is only necessary that the intent of the grantor be ascertained and then such construction will be given the words used as to render them efficacious to accomplish such purpose. *Rutherford* v. *Green's Heirs*, 2 Wheat, 196, 4 L. Ed. 218. In *New York Indians* v. *United States*, 170 U. S. 1, 18 Sup. Ct. 531, 42 L. Ed. 927, in the granting part of the Treaty, the term "United States agree to set apart," etc., was held a grant of land in praesenti. Clearly there were no technical words of grant in the phrase "agree to set apart." See, also, *Winona & St. Peter Ry. Co.* v. *Barney*, 113 U. S. 618, 28 L. Ed. 1109; *U. S.* v. *Denver & Rio Grande Ry. Co.*, 150 U. S. 1, 37 L. Ed. 975.

Not only do the plain terms of the Choctaw Coal & Railway Company Act show a clear intention on the part of Congress to grant a right-of-way in praesenti to the Railway Company, but the Act of March 2, 1889, 25 *Stats.* 980, making appropriation to pay the Creek Indians in full for their entire claim to the land and authorizing the Country to be opened to White settlement and the President's opening Proclamation of March 23, 1889, 25 *Stats.* 1544, and the Organic Act of May 2, 1890, 26 *Stats.* 81, contain clear and specific provisions reserving all rights-of-way for railroad companies and protecting their rights therein. Even if it could consistently be held that the Choctaw Coal & Railway Company Acts did not grant a right-of-way in praesenti, by reason of Indian rights, the said Act of March 2, 1889 and subsequent Acts were sufficient within themselves to grant the right-of-way to the Choctaw Coal & Railway

Company. And it will be remembered that these Acts were passed by Congress after all claim of the Creek Nation had been ceded to the United States. In said Act of March 2, 1889, it is provided as follows:

> "But such release conveyance (meaning the Creek and Seminole conveyances) and extinguishment shall not inure to the benefit of or cause to vest in any railroad company any right, title or interest whatever in or to any of said lands, and all laws and parts of laws, so far as they conflict with the foregoing, are hereby repealed, and all grants or pretended grants of said lands or any interest or right therein now existing or on behalf of any railroad company, *except rights-of-way and depot grounds, are hereby declared to be forever forfeited for breach of condition.*" (Italics supplied).

In the *President's opening Proclamation,* dated March 23, 1889, it was specifically declared that:

> "It will, at and after the hour of twelve o'clock noon of the twenty-second day of April, next, and not before, be open for settlement, under the terms of and subject to, *all the conditions, limitations and restrictions contained in said Act of Congress, approved March second, eighteen hundred and eighty-nine, and the laws of the United States applicable thereto.*" (Italics supplied).

In *Section* 18 *of the Organic Act of May* 2, 1890, is the following language:

> "All tracts of land in Oklahoma Territory which have been set apart for school purposes, to the educational societies or missionary boards at work among the Indians shall not be opened for settlement, but are hereby granted to the respective educational societies or missionary boards for whose use the same has been set apart.

> "No part of the land embraced within the territory hereby created shall inure to the use or benefit of any railroad corporation, *except the rights-of-way and land for stations heretofore granted to certain railroad corporations*" (Italics supplied).

We believe it is clear that Congress did not intend that the railroads which had been granted rights-of-way through this Country should be forced to rely upon some technical language that might be found in the Acts themselves, but that it intended to make it clear and positive every time it passed a law relating to the lands in this Country that the railroad rights-of-way should not be interfered with. In the last quotation above set forth we believe it is certain that the Congress of the United States intended to give certain lands to the Missionary Boards, etc. and at the same time and with language equally as clear and significant, Congress made it plain that the rights-of-way previously granted to railroad companies should absolutely belong to the railroad companies.

At pages 31 and 39 of petitioners' brief, they cite *United States* v. *Fort Smith and W. R. Co.*, 195 Fed. 211, as authority to show that the Supreme Court of the State of Oklahoma placed a wrong construction upon the grants to the Choctaw Coal & Railway Company. That case has no application to any issues in the instant cases. There was only one question before the court for determination, and that was whether the railroad company should be required to pay the Creek Nation $50.00 per mile for right-of-way over land which had been previously allotted in severalty to the various members of the Tribe. The Creek Nation had no interest in the land at the time the suit was brought because the land had been allotted to the Indians in severalty. Of course, in

a case where the issues were thus drawn, there was only one question for the court to determine, and that was the right of the Nation to collect from the railroad company $50.00 per mile for a right-of-way. When the court determined that question, that decided the case. All comment on other questions by the court was purely dictum; and such statements were made without any thought or reference to such issues as are to be decided in the instant cases.

Moreover, Congress, on March 2, 1899 (*Chap.* 374, 30 *Stats.* 330 *Secs.* 1 *and* 2) which was the day before it passed the *Fort Smith & Western Act,* expressly authorized railroad companies to exercise the power of Eminent Domain "to take rights-of-way through any land held by an Indian Tribe and through any Indian Reservation in the Territory" on condition that it should "make compensation therefor to the Nation, to any occupant, and *to any allottee* for the damage resulting by taking of the right-of-way, and the construction of the railroad."

And in the Act of March 3, 1899, which is the *Fort Smith & Western Railway Act,* (*Chap.* 453, 30 *Stats.* 1368) it was specifically provided that before the company should construct its railroad through any of the lands held by individual occupants, "according to the laws, usages and customs of the Creek Nation, *or under the laws or Treaties of the United States,* compensation should be made to such occupants for all their property to be taken or damage to be done to them by reason of construction." It is patent, from reading the above statutes that quite a different situation obtained at the time of the enactment of the *Fort Smith & Western Act* from that which existed when the *Choctaw Act* of 1888 as amended in 1889 was passed.

The *Fort Smith & Western Act,* when considered in connection with the Act of Congress which was passed on March 2nd, 1899, the day before the passage of the *Fort Smith and Western Act,* is a great deal broader and quite different from the *Choctaw Coal & Railway Company Act.* Those Acts not only provided for paying individual occupants, "according to laws, usages and customs of the Creek Nation," but also provided for paying any allottee or any person who held under *any laws or Treaty* of the United States. However, it will be noted, that those Acts specified in expressed terms who should be paid compensation. Under those Acts, the Creek Nation after it had parted with title to the land, and had conveyed all the interest it had to individual allottees, sought to recover $50.00 per mile from the railroad company. Of course, the court held that the Creek Nation, under such circumstances, had no interest in the land, and, therefore, was not entitled to recover. That was the only issue before the court in the *Fort Smith & Western Railroad Company case,* and that was the only proper question for the court to consider, and it was the only question decided.

At page 47 of petitioners' brief they cite *Cherokee Nation* v. *Southern Kansas Railway Co.,* 33 Fed. 900, and also at page 49 of their brief, they cite the opinion of the Supreme Court of the United States in the same case reported in 135 U. S. 641 as authority for their contention that the Choctaw Coal & Railway Company Acts were not grants of right-of-way in praesenti. That case has no application to any issue in the instant cases.

The only question in the Cherokee case was whether Congress had the right to authorize a railroad company to acquire the Cherokee title by condemnation. The suit

was between the Cherokee Nation and the Railroad Company. The court, as was only proper, discussed the question as between the railroad company and the Cherokee Nation. The only language used by the court in the Cherokee case which could be considered as being in any wise favorable to the contention of plaintiffs was dictum and it was used as before stated, in discussing an issue wholly between the Cherokee Nation and the Railroad Company as to the power of Congress to grant the railroad company the right to acquire the Cherokee title by condemnation.

At page 53 of petitioners' brief they say the *Fort Smith & Western case* above cited, is especially pertinent because the court holds that *St. Joseph & Denver R. Co.* v. *Baldwin,* 103 U. S. 426, has no application and they proceed to draw the conclusion that inasmuch as the Baldwin case has no application to the *Fort Smith and W. R. Co. Case,* it has no application to the case of *Churchill* v. *Choctaw R. Co.,* 4 Okla. 462, *supra,* and seek by this method to destroy the effect of the decision in the *Churchill case.*

It will be remembered that the *Mackey case* above referred to was predicated on the identical *Choctaw Coal & Railway Co. Act* which is involved in the instant cases and it will be observed that the Supreme Court of the United States in the *Mackey case* predicated its opinion upon a previous opinion rendered by it in *Rio Grande & W. R. Co.* v. *Stringham,* 239 U. S. 44, 60 L. Ed. 136, decided Nov. 1, 1915, and the decision in the *Stringham case* was predicated on *Northern Pac. R. Co.* v. *Townsend,* 190 U. S. 267, 47 L. Ed. 1044, and the *Townsend case* was based upon the *Baldwin case.* Consequently the *Mackey case* decided by the Supreme Court of the United

States, and which involved the identical Choctaw Coal & Railway Company right-of-way grant and the *Churchill case,* decided by the Territorial Supreme Court, which also involved the same grant, were both predicated upon the *Baldwin case.* In view of these decisions, the holding in the *Fort Smith & Western R. Co. case* that the *Baldwin case* had no application only confirms our position that the *Fort Smith & W. R. Co. case* has no application to any issue in the instant cases.

SECOND PROPOSITION

Petitioners in the Second Proposition of their brief discuss a question which is not, under the facts and circumstances material or applicable to any issue in the instant cases. However, inasmuch as petitioners, at page 58 of their brief, make the contention that the ancestors of petitioners in the Noble case settled on the land involved on the day of the opening of the Country to White settlement and that such occupancy gave the ancestors a prior right to the land, as against all others except the United States, we respectfully request that it be borne in mind that the Railway Company was given the right-of-way Feb. 13, 1889; that Congress thereafter, on March 2, 1889, passed the Act authorizing the opening of the Country to White settlement; that the Railway Company, before April 22, 1889, the day of the opening, had surveyed its line of road and had staked its right-of-way across the very land settled on by the ancestors in the *Noble case* and that such settlement was made in disregard of the rights of the Railway Company and with full knowledge of the fact that the land was then being claimed by the Choctaw Coal & Railway Company for a right-of-way.

Furthermore, this identical land was all included in the map of the temporary survey, filed with the Secretary of the Interior July 13, 1889, and that the line of railroad was thereafter actually constructed over the land and the construction thereof fully approved by Congress, (29 Stats. 98) and the Secretary of the Interior. (R. 88). In other words, notwithstanding that both the rights and the occupancy of the railway company were prior in time to the occupancy of the said ancestors, the ancestors wholly disregarded and ignored the claims of the railway company.

At page 58 of their brief, petitioners say:

> "It was conceded in the trial court and in the Supreme Court below that unless the Railway Company's title to its claimed right of way through the Oklahoma City townsite vested instantly under the Act of Congress, then its title thereto was not prior and superior, but was junior and inferior, to the claims of the petitioners' predecessors in title."

The above quotation does not correctly state the position respondents took before the State Courts, and it is with regret that we are forced again to refer to the position respondents took before the State Courts. However, inasmuch as written briefs were filed it is an easy matter to establish the contentions of respondent. In discussing the title of the Railway Company to the right-of-way, respondents insisted that even the Act of March 2, 1889 was sufficient within itself to grant the right-of-way.

The contention is set forth at page 71 of respondents' brief, filed with the State Supreme Court, in the following language:

> "This action of Congress (the reservation of Railroad Rights of Way in the Act of March 2, 1890)

> is enough within itself to give the railway company a vested title to the right of way and depot grounds and it cannot be urged that Indian rights prevented the railroad company from taking under this Act. This action of Congress, if it had not been previously done, placed the right of way granted to the Choctaw Coal and Railway Company, in so far as it went through the lands of Oklahoma Territory belonging to the United States, in exactly the same position as railroads to whom other special grants of rights of way through the public lands had been made and in which no provision had been made for compensation to those who might thereafter settle upon such rights of way. All this, it will be remembered, was done before this country was opened to white settlement and at a time when the United States owned the land outright and could do as Congress saw fit and proper regarding it."

And after using the above language the respondents proceeded to discuss the President's opening Proclamation, dated March 23, 1889 and the Organic Act passed by Congress May 2, 1890, as they related to Railroad rights-of-way. The same points have been herein before discussed.

THIRD PROPOSITION

Petitioners' Third Proposition discussed at page 58 of their brief, is devoted to a variety of questions. They first discuss the character of title that a Railroad Company takes to a right-of-way by a grant from Congress. That question has been decided so many times that we do not believe any good purpose could be served by devoting time to it here, except as an incidental matter.

We observe that petitioners, in discussing the character of a right-of-way title did not cite *Mackey, Coun-*

ty Treas. v. *Choctaw, Oklahoma & Gulf R. R. Co.*, 256 U. S. 531, 65 L. Ed. 1076. That case passed on the character of title granted to the Choctaw Coal & Railway Co. by the very Acts of Congress involved in the instant cases. It will be observed that the Supreme Court in that case placed the title that the Railway Company took in the same category with the title granted to other Railroad Companies by other Special Congressional Grants.

It will also be further observed that the court held in that case that upon abandonment of the railroad the right-of-way would revert to the Creek Nation. Of course it will be remembered that Holdenville, Oklahoma, where the case arose, is in that part of the old Creek Nation which was not ceded to the United States as was the land in and about Oklahoma City. We believe that by applying the same principle, that inasmuch as the Creek Nation, by the Treaty of Jan. 19, 1889, ceded to the United States every right and claim to the land in Western Oklahoma, including the land in and about Oklahoma City and that involved in the instant cases, that upon abandonment of the right-of-way in the Country so ceded, the title to the right-of-way would revert to the United States. This, it will be observed, was the view that was taken by the State Supreme Court in its decisions in the instant cases.

Petitioners, at page 65 of their brief, cite without comment, *Northern Pac. Ry. Co.* v. *Townsend*, 190 U. S. 267, 23 Sup. Ct. 671, 47 L. Ed. 1044. This case is one of the outstanding cases in the United States on many of the material questions involved in the instant cases. We believe that if this case is followed there can be no question as to the correctness of the decisions of the State

Supreme Court. The case settles so many vital questions we shall, at the risk of being considered tedious, discuss it at length.

What were the facts and how does the law announced therein apply to the instant cases?

On July 2, 1864, Congress granted the Northern Pacific R. R. Company a right of way over the public lands of the United States located in the State of Minnesota. Subsequent to that date Townsend homesteaded a portion of the land over which the railroad company constructed its line of road. The Land Department of the United States issued a patent, as in the instant cases, purporting to convey the entire tract of land over which the railroad was constructed to Townsend, and made no exception or reservation as to the right-of-way; that is to say, the rights of the railroad company were entirely ignored by the Land Department, and no reference whatever was made to the railroad in the patent.

The railroad right-of-way across this land, as granted by Congress, was 400 feet in width, and of course, the principal portion of the right-of-way was not put to any use by the Railroad Company. Townsend, who had a patent to the land plowed up and cultivated that portion of the right-of-way which was not in actual use and continued to cultivate it under claim of ownership a sufficient number of years to give him title to it by adverse possession under the laws of the State of Minnesota. Townsend, the Homesteader, sold the tract of land for which he held the patent from the United States to Minerva Townsend, who continued to cultivate, use and occupy the land, just as the homesteader previously had.

In the course of time the Railroad Company made a demand for possession of that portion of the land which

was within the granted right-of-way and the demand was refused. The Railroad Company instituted a suit in ejectment in the state courts of Minnesota to recover the land. The defendant claimed title to the land by virtue of the patent and also by adverse possession. The trial court held in favor of the Railroad Company, but upon appeal, the Supreme Court of Minnesota held against the Railroad Company, reversed the case and ordered a new trial. (86 N. W. 1007)

On appeal to the Supreme Court of the United States Mr. Justice White, rendering the opinion of the court reversing the Supreme Court of Minnesota, said:

> "At the outset we premise that, as the grant of the right of way, * * * the land forming the right of way herein was taken out of the category of public lands subject to preemption and sale, and the *Land Department was therefore without authority to convey rights therein. It follows that the homesteaders acquired NO INTEREST in the land within the right of way because of the fact that the grant to them was of the full legal subdivisions.*" (Italics supplied).

The above holding is not susceptible to but one construction. It states in unmistakable language that as soon as the Act granting the right-of-way was passed the land forming the right-of-way ceased to be public lands and the *Land Department of the United States ceased to have authority to convey rights therein.* Moreover, the holding goes further and says that if the Land Department of the United States goes ahead under such circumstances and issues a patent broad enough in its terms to include the land embraced in the right-of-way, *the patentee acquires NO INTEREST in the land within the right-of-way by virtue of that patent.*

Where does this leave the petitioners in the instant cases? If the United States Land Department was without power and authority to grant an interest in the land involved in the instant cases where did petitioners acquire their interests? To ask these questions is to answer them.

The opinion in the *Townsend case* goes still further; and makes observations as to the character of title the Railroad Company took, and virtually assigns reasons for the zealousness on the part of Congress to see that no private individual acquires an interest in lands covered by such rights-of-way.

On this point the court among other things said:

> "* * * it must be held that the fee passed by the Grant made, * * *. In effect, the Grant was of a limited fee, made on an implied condition of reverter in the event that the Company ceased to use or retain the land for the purpose for which it was granted.
>
> "To repeat, the right-of-way was given in order that the obligations to the United States assumed in the acceptance of the Act, might be performed.
>
> "* * * As here, we find that the nature of the duties imposed by Congress in giving the right of way through the public domain are inconsistent with the power in an individual to acquire, for private purposes, by limitation, a portion of the right of way granted by Congress. The cases in question are inapposite."

In the last above quotation it will be observed that the court gave utterance to the following sentence:

> "In effect the Grant was of a limited fee, made on an implied condition of *reverter* in the event that the Company ceased to use" etc.

Our analysis of this case would be far from complete

should we not analyze and briefly discuss the import and meaning of this sentence. Notwithstanding its brevity and apparent simplicity, it speaks volumes and contains the fundamental underlying reason why it has always been utterly impossible for anyone to obtain an interest in a railroad right-of-way granted by Congress without an Act of Congress unmistakably authorizing a sale or other disposition thereof.

It will be noticed that the court said that the grant was "made on an implied condition of reverter." The question naturally arises—To whom shall it revert? Shall it revert in case of abandonment to some person like Townsend who held a patent, issued without authority by the Land Department of the United States, broad enough in its language to cover it? There can be but one answer to the question, and that is in the negative, for the court not only struck down Townsend's claim based on adverse possession, but also the claim predicated upon the patent, and held that a patent issued by the Land Department conveyed

> *"NO INTEREST in the land within the right-of-way"* (Italics supplied).

Then, to whom must it revert? To the United States, of course. That is exactly what the court said by the language just discussed. Although Townsend held a patent to the land from the Land Department of the United States, the court condemned the claim based thereon as well as the claim based on adverse possession and declared that the patent conveyed no interest in the land whatsoever. To have held that an interest was acquired by virtue of the patent would have destroyed the right of possibility of reverter in the United States. Such a holding would have been tantamount to saying

that a governmental agency, as the Land Department, acting in excess of its authority, could by such action destroy a right of the United States in land, and in such instances, as those under consideration, defeat the very object and purpose of the United States in keeping the rights-of-way granted by Congress intact.

Congress was endeavoring to promote the building of railroads and realized that one of the important factors in the construction of a railroad was a right-of-way; and the Supreme Court of the United States fully recognizing the object and purpose of Congress to promote the building of railroads in this Western Country, and also taking cognizance of the fact that the continuity of a right-of-way was what was necessary, and one of its chief values, early adopted the rule in construing these railroad right-of-way grants that no individual, except by express authority of Congress itself, could possibly acquire any interest in one of these railroad rights-of-way and that as soon as such a right-of-way was abandoned it immediately reverted to the United States where it could be disposed of only by Congress in such manner as it saw fit.

In *L. D. Holland Company* v. *Northern Pacific Railway Company*, 214 Fed. 920, the court said:

> "The value of a right-of-way is dependent upon its continuity, and surely it could not have been contemplated that in case of reversion the Government would get back only numerous disconnected fragments of that which it was granting as a continuous line."

Also the court in *St Joseph & Denver City R. R. Co.* v. *Baldwin*, 103 U. S. 426, 26 L. Ed. 578, said that con-

tinuity of railroad rights-of-way is chiefly what makes them valuable.

It was the *Townsend case,* together with some others that resulted in the Secretary of the Interior making his ruling in the *Cradall case,* 43 L. Dec. p. 556, and which later resulted in Cradall's procuring the passage of the private Act by Congress, authorizing the Secretary of the Interior to convey him a strip of abandoned railroad right-of-way over land to which he held a patent.

Petitioners at page 67 of their brief cite without comment *Rio Grande Western R. Co.* v. *Stringham,* 239 U. S. 44, 60 L. Ed. 136.

There is nothing in that case which could be construed by the greatest stretch of the imagination to conflict in any wise with the decisions of the state Supreme Court in the instant cases. In fact, the decision in that case is in exact harmony with the decisions of the state Supreme Court and is a strong authority in support thereof.

Where land has been once set apart for or appropriated to any particular purpose by Congress, the Land Department, in the absence of an Act of Congress, granting it clear and unmistakable power and authority so to do, has no authority to dispose of any remaining interest of the United States therein. This contention is not only strongly supported by the *Townsend case* discussed *supra,* but by many other cases, some of which are the following:

Salt Lake Investment Co. v. *Oregon Short Line R. R. Co.,* 246 U. S. 446, 62 L. Ed. 823;
Kansas City Pac. Ry. Co. v. *Dunmeyer,* 113 U. S. 629, 28 L. Ed. 1122;
Northern Pac. Ry. Co. v. *Ely,* 197 U. S. 1, 49 L. Ed. 639;
St. Louis Smelting etc. Co. v. *Kemp,* 104 U.

S. 636, 26 L. Ed. 875;
M. K. & T. Ry. Co. v. *Watson,* 74 Kas. 494, 87 Pac. 687;
Wilcox v. *Jackson,* 13 Peters 611, 10 L. Ed. 264;
Doolan v. *Carr,* 125 U. S. 618, 8 Sup. Ct. 1228, 31 L. Ed. 844;
R. Co. v. *Litchfield,* 23 Howard 66, 16 L. Ed. 500.

The title to a right-of-way granted by Congress passes as of the date of the Act.

St. Joseph & Denver City R. R. Co. v. *Baldwin,* 103 U. S. 426, 26 L. Ed. 578;
Bybee v. *Oregon & C. R. Co.,* 26 Fed. 586; and the same case, 139 U. S. 663, 35 L. Ed. 305;
Northern Pac. Ry. Co. v. *Ely,* 197 U. S. 1, 49 L. Ed. 639;
Stuart v. *Pac. R. R. Co.,* 178 Fed. 753;
Neilson v. *Northern Pac. Ry. Co.,* 184 Fed. 601;
Northern Pac. Ry. Co. v. *Hasse,* 197 U. S. 9, 49 L. Ed. 642;
Churchill v. *Choctaw R. R. Co.,* 4 Okla. 462, 46 Pac. 503.

Furthermore, a grant of a right-of-way between two fixed termini, is a law as well as a conveyance and all subsequent settlers must take notice thereof.

M. K. & T. R. R. Co. v. *Kansas Pac. R. R. Co.,* 97 U. S. 491, 24 L. Ed. 1095;
Schulenberg v. *Harriman,* 21 Wall. 44, 22 L. Ed. 555;
U. S. v. *Southern Pac. R. R. Co.,* 146 U. S. 570, 36 L. Ed. 1091;
Northern Pac. v. *Wadekamper* (Wash.) 126 Pac. 909;

Nadeau v. *Union Pac.*, 253 U. S. 446, 64 L. Ed. 1003;
Bybee v. *Oregon S. L. Co.*, 26 Fed. 586, 139 U. S. 663, 11 S. Ct. 641;

and many of the other cases herein cited.

Petitioners, at page 64 of their brief, call attention to *Denver & H. G. R. Co.* v. *Mills*, 222 Fed. 481. They say that the court in that case had before it the precise question involved in the cases at bar. In this the plaintiffs are very much in error.

That suit was between the railway company which had abandoned its right-of-way and a homestead settler or his successor in interest who had title to the abutting land on the right-of-way. Immediately after the railroad company abandoned the right-of-way, the plaintiff who owned the abutting land took possession of it under claim of absolute ownership, and after he had held the abandoned right-of-way for a period of time longer than is required in the State of Colorado to acquire title by adverse possession, the railway company decided that it would again take the abandoned right-of-way and use a part of it. Moreover, there was a special statute in Colorado which provided that when a railroad company abandoned a part of its line of road and established a new line, the old abandoned right-of-way should upon certain conditions go to the owners of the land through which it was granted.

The United States were not a party to the suit, nor was anyone a party who was standing in the shoes of the United States as to the ownership of the right-of-way, but the suit was between the railway company which had many years before abandoned the right-of-way and the owner of the abutting property.

Thus, it will be seen that there was really only one question involved and that was whether the railroad company had abandoned the right-of-way. If the railroad company had actually abandoned the right-of-way and the court so found, of course it had no standing in a court, as against the one who had been so long in peaceable possession, for the railway company could not disturb another's peaceable possession of land to which it had no title; and, especially in the face of the special statute of Colorado covering such situations. In other words, that suit might be likened unto one between A and B over land which belonged to C, who was not a party and had no knowledge of the suit.

So, it is patent that what the court said in that case relating to where the title to a right-of-way goes upon abandonment, is dictum of the plainest sort.

Petitioners, at page 65 of their brief, cite and discuss the case of *Crandall* v. *Goss* (Ida.) 167 Pac. 1025, as one which they say is quite similar to the cases at bar.

What we have just said relating to *Denver & R. G. Co.* v. *Mills, supra,* is equally applicable to this case. Not only is this true, but the court itself, in the case of *Crandall* v. *Goss, supra,* recognizes the fact in the opinion that it is only indulging in unnecessary comment when it discusses where the title to a right-of-way reverts upon abandonment; for the court used the following language:

> "• • • *However that may be, the title of the government is not here called in question.* Assuming that the abandoned portion of the right of way reverted to the United States and not to the owner of the land across which it was located the question presents itself; May one in possession of land, the ownership of which is in the United States, main-

tain an action to quiet his claim of title and right of possession as against third persons:

* * * *

"Following the doctrine announced in that case, we hold that this action may be maintained by respondent for the possession of the land in controversy and for the purpose of quieting his title thereto as against appellant." (Italics supplied.)

As further confirming the correctness of respondent's position, attention is called to the fact that notwithstanding that Crandall won the strip of abandoned right-of-way in the courts of Idaho as against Goss, yet he still had no title, for as a matter of fact upon the land being abandoned by the railroad company the title thereto reverted to the United States, and Crandall in order to get actual title to the land was compelled to go to the Congress of the United States and obtain the passage of a special Act authorizing the Secretary of the Interior to convey him this strip of land. (R. 78-83)

Petitioners at page 62 of their brief discuss at length some comments of the court in *Smith* v. *Townsend,* 148 U. S. 490. They italicize some of the remarks of the court in which the court stated in substance that upon abandonment of the particular right-of-way discussed in that case it would vest in the patentee of the land.

A mere casual glance at the case will show that the remarks of the court were not pertinent to any issue in the case. And the court itself recognized at the time of making the remarks quoted in the brief of petitioners that they were purely dictum, for the court continued with the following language:

"But whether this be so or not (meaning whether the right-of-way upon abandonment goes to abutting owners or not) it is enough that in the cession, in the act of Congress and the proclamation of the

> President the land was dealt with as an entirety, with certain metes and bounds, and it is that body of land thus bounded which all parties were forbidden to enter upon who desired thereafter to enter any portion as a homestead."

Furthermore, since the rendition of the decision in *Smith* v. *Townsend, supra,* the Supreme Court of the United States has ignored that dictum and made a contrary decision in a number of cases, to-wit:

> *Northern Pac. R. R. Co.* v. *Townsend,* 190 U. S. 267, 47 L. Ed. 1044;
>
> *Mackey, County Treas.* v. *Choctaw Okla. & Gulf R. R. Co.,* 261 Fed. 342, and 256 U. S. 531; 65 L. Ed. 1076;

and others which could be cited.

Both of the cases just cited have been hereinbefore discussed and we shall make no further comment, other than to say that the court in the *Mackey case* held that the right-of-way upon abandonment would revert to the Creek Nation. Of course in case of abandonment of the right-of-way in that part of the State ceded absolutely to the United States by the Creek Nation, such right-of-way upon abandonment would revert to the United States as was held in the opinions rendered by the state Supreme Court in the instant cases.

There are other cases cited under the same proposition in the brief of petitioners which are of like import as those above discussed and have no real application to any issue involved in the instant cases.

FOURTH PROPOSITION

Petitioners in their discussion of this Proposition endeavor to show abandonment and estoppel by reason of the fact that the Choctaw Coal & Railway Company re-

ceived deeds from the occupants of the right-of-way through what is now a portion of Oklahoma City. Petitioners say at page 69 of their brief that the railway company took deeds from private owners whose title rested on a patent from the United States.

It will be remembered that the record shows that the settlers in Oklahoma City, on the 22nd day of April, 1889, the day of the opening to white settlement, absolutely ignored and disregarded all claims of the Railway Company to the right-of-way. And it is also true that some of the citizens of Oklahoma City who were anxious to see the line of railroad constructed, procured deeds from the settlers for the right-of-way containing reversionary clauses, for which the settlers were paid by the citizens, but the Railway Company was all the time claiming a right-of-way under the Acts of Congress and refused to pay anything for such right-of-way.

This contention of petitioners presents no new question, for there are a number of cases which absolutely determine the question against the contention of Petitioners. In *Bybee* v. *Oregon & C. R. Co.* 26 Fed. 586, the Court had before it the precise question which is now under consideration.

Congress by Act approved July 25, 1866, granted a right of way over the public lands to the railroad company; and on the very next day Congress also granted to another party, a right of way over the same lands for a ditch. The railroad company did nothing to establish and construct its road before the year 1883, but the ditch was located and constructed in the year 1879.

It became necessary for the railroad company, in constructing its road in 1883, to cross the ditch, but the owner of the ditch refused to let the railroad company cross it. So, a controversy followed and the railroad

company finally acknowledged the claim of superior right of the owner of the ditch, and paid him $250 for a right of way over the ditch and took a deed which contained conditions obligating the railroad company in many ways. In the course of time, a lawsuit arose between the railroad company and the owner of the ditch. And it became necessary in the suit for the railroad company to attack the claim of prior right of the owner of the ditch and claim prior right for itself. Of course, when this position was taken by the railroad company, the owner of the ditch pleaded, as petitioners have in the instant cases, waiver and estoppel on the alleged ground that the railroad company by taking the deed acknowledged that the owner of the ditch had a superior right to the right of way.

These issues placed the question squarely before the court for decision as to whether even the railroad company itself could in that manner be estopped from claiming and be deprived of the benefits of the right of way expressly granted to it by Congress.

The court, after holding that when the railroad company took the deed from the owner of the ditch, it created the relation of vendor and vendee, used the following appropriate language:

> "It is a well established rule of law, that ordinarily, a vendee is under no obligation to support his vendor's title, and therefore, he is not estopped to deny the same."

And after discussing the question further, the court said:

> *"From the date of the definite location of the line of the defendant's road, the plaintiff had no right or easement to or in the land within the defendant's right of way, and was to all intents and*

purposes, a naked trespasser thereon. He never had anything to sell or convey to the defendant.

* * * *

"The defendant purchased the privilege of constructing and operating its road across and along the ditch for $250.00 and on the further condition that they would not thereby obstruct or impair the same. But, this condition or covenant being incident to and dependent upon the conveyance of some right in the premises to the defendant, if the latter is at liberty to show that nothing passed by such conveyance, the condition or covenant is left without consideration or support and falls to the ground.

* * * *

"But the plaintiff has really parted with nothing nor has the defendant obtained anything from him, although it has paid the plaintiff $250.00. The ditch was dug on what turned out to be the defendant's right of way land, and the plaintiff, in consenting to allow it to construct and operate its road there, *surrendered nothing to which it had any legal right. The conveyance was altogether an idle and superfluous act,* and whatever misapprehension of the parties as to their rights in the premises may have induced, in legal effect, it is a mere nullity." (Italics supplied).

It will also be remembered that this case was appealed to the Supreme Court of the United States and is reported in 139 U. S. 663, 35 L. Ed. 305.

In affirming the decision of the lower Court and discussing questions which we believe had a great deal more merit to them than any of the questions involved in the instant cases, the court used the following language:

"With regard to the question of estoppel, the *claimant alleges that the defendant went into possession* of that portion of the plaintiff's ditch across

which its road was constructed, under a deed from plaintiff and his tenant in common, for a consideration of $250.00 paid."

"* * * We have already found that the title of the Company to its right of way upon the location of its route related back to the date of the Act, and hence that when it took possession of the land in question plaintiff had no title thereto which he could set up against the company. Had the defendant not accepted the deed from the plaintiff, it might, under our ruling upon the first point, have treated him as a trespasser. The real question then is, whether the defendant is placed in a worse position by having accepted the deed from a party who had no title to the premises he assumed to convey— the defendant having taken the conveyance under a mistaken view of the law applicable to the case."

* * * *

"If, as we hold, the defendant had the prior right to this land, it was under no obligation to treat with the plaintiff to pay him for the disturbance of his possession which was unlawful as against the company. Has it by this deed disqualified itself forever from asserting the right that it would have possessed had it not done this? We think not."

* * * *

"We do not consider it a breach of good faith upon the part of the defendant to set up this fact; (meaning claim of prior right) *nor ought it to be put in a worse position by having accepted this deed and* $250.00 *therefor, than it would have occupied had it refused altogether to treat with the plaintiff.*"

"And it would be manifestly unjust to hold the defendant forever estopped from asserting the invalidity of the covenant into which it had inadvertently entered." (Italics supplied).

It is difficult for us to conceive how language could be much stronger than that contained in the decisions of the above case. And, it should be borne in mind that it was the railroad company itself pleading its prior rights, and not some person, who had succeeded not only to the rights of the railroad company, but also to the rights of the United States, as in the instant cases.

In *Oregon Short Line R. R.* v. *Quigley,* 10 Ida. 770, 80 Pac. 401, it was sought to invoke abandonment, waiver and estoppel against the Railroad Company which took deeds from settlers on the right of way, but the Court refused to sustain such contentions.

The court, in discussing the questions, said:

> "The grantors have lost nothing by the transaction, nor have they been prejudiced in any of their rights or lulled to repose by any act of the grantee. On the contrary, they have benefited by the transaction to the extent of the purchase price which they received for the execution of the quit-claim deeds."

And the court after further holding that Congress granted the right of way to the railroad company in fee for a certain purpose, and that the company could not convey it, said:

> *"And if it could not do so, (convey) by solemn grant, it certainly could not do so, by an act which might be construed into a recognition of adverse possession."* (Italics supplied).

When a right of way is granted to a railroad company by Congress over the lands of the United States and the railroad company undertakes to build the road, and does build it under the terms of the grant, the title to the right of way cannot be lost to any in-

dividual by any action or lack of action on the part of the railroad company. The railroad company is as powerless to give title or to throw the title away to an individual and thereby defeat the terms of the Act and the purpose that Congress had in granting the right of way, as an individual himself would be to acquire title to property of the United States without the authority of Congress.

Another late and clear expression of the courts upon the proposition is contained in the case of *Barnes and Mulvihill* v. *Southern Pacific R. Co.*, 16 Fed. (2d) 100. The railroad company in that case had been granted a right of way 200 feet in width, over the public lands; and when it attempted to locate and construct its road, it had trouble with Barnes and Mulvihill, settlers on some of the land. A settlement was finally made and the railroad company paid for a right of way 100 feet in width and took deeds from Barnes and Mulvihill. The company also made maps showing its right of way to be only 100 feet in width through this land instead of 200 feet.

In after years, the railroad company brought suit to recover the full 200 feet of right of way granted by Congress; and Barnes and Mulvihill virtually made the same claims that are being made in the instant cases.

The trial court even refused to permit Barnes and Mulvihill to introduce the deeds and maps in evidence, and rendered judgment for the railroad company.

The opinion of the court affirming the judgment of the trial court is very instructive. However, we shall only quote the plain rule laid down by the court as follows:

"Neither the acts nor the acquiescence of the

grantee of the government can operate to defeat the will of the grantor."

Union Pac. Ry. Co. v. *City of Greeley,* 189 Fed. 1, is another case where deeds were taken from settlers who contested the rights of the Railroad Company. The railroad company in that case when a controversy arose as to its right of way, consented to take a very narrow strip for a right of way through the town for which it took deeds containing unusual conditions and provisions from those claiming to own the title. The railroad company never even laid claim to the right of way 400 feet in width, which was the width granted by Congress. Moreover, the company recognized the city as being the owner of the streets and alleys, as shown on the town plat, running across the land being procured for right of way purposes and obtained its consent to use such streets and alleys. And furthermore, the railroad company not only failed to lay claim to the full 400 feet of right of way through the town it tacitly and expressly in almost every conceivable manner gave full recognition of the claim of title by those who claimed to own that portion of the 400-foot strip not claimed nor used by the railroad company for right of way purposes. This action and conduct on the part of the railroad company continued throughout a period of 40 years. It had seen the occupants of this land spend fortunes on it in the way of permanent improvements. In fact, the land had been held so long and had become so valuable on account of the thrift and industry of those who had lived upon it that it would seem inconscionable to permit anyone to take this land away from them. But notwithstanding this situation, when the railroad company changed hands, it attacked the title of those who were within the 400 feet and they found themselves without any defense, even as against

the railroad company. This decision, while one greatly affecting thousands of people throughout many of the western states stands now as the settled law and has not been criticised as being unsound in principle.

So widespread were the effects of the decision in the *Greeley Case,* that even Congress, not in a spirit of criticism of the decision and the decisions of the Supreme Court of the United States upon which it was based, but with a full recognition of the correctness and soundness of the decision and in the exercise of its absolute power and control over such rights of way, passed the Norris Act, ((37 Stats., 138) in order to relieve the people, not only from the hardships of this particular decision but from many other cases involving similar situations.

The report of the Congressional Committee on the Judiciary on the Norris Act is very illuminating. (R. 61-77).

Petitioners also claim in their brief at page 69, that the final location of the line of railroad through Oklahoma City was not on the survey as originally made. That is true as to the land involved in the Higgins case, but as to the land involved in the Noble case, it will be remembered that the survey was never changed. Previous to the day of the opening on the 22nd of April, 1889, there had been a temporary survey of the right of way made and stakes driven showing its temporary location; and, on the day of the opening the right of way over the Noble land was indicated by stakes, markers and signs, showing that it was claimed for a railroad right of way. But notwithstanding this, the ancestors of petitioners Noble, ignored the claim of the railroad company and settled on the land, so the ancestors in the Noble case, not only had constructive notice of the claim

of the railway company, but they had actual notice thereof.

But it was not even necessary that anything be done by the railway company before the opening in order for it to obtain its right of way. That has been decided many times in the various cases hereinbefore discussed. Furthermore, the fact that the railway company in its final location of the road, varied from the temporary survey in some places is entirely immaterial. It will be observed in this connection that petitioners in their brief failed to cite any authority showing that the variance was fatal. Moreover, it will be remembered that the road as actually constructed was duly approved by an Act of Congress in 1896, and was later approved by the Secretary of the Interior.

Some of the cases in which it has been held that a variance from the temporary survey was permissible, are as follows:

Stuart v. *Pac. R. R. Co.*, 178 Fed. 753;
Neilson v. *Northern Pac. Ry. Co.*, 184 Fed. 601;
Union Pac. R. Co. v. *Hegger* (Kan.) 204 Pac. 1008;
United States Ex rel. Search, v. *C. O. & G. R. R. Co.*, 3 Okla. 404, 41 Pac. 729.

(Holding that the filing of a map was not necessary under the Acts involved, and that a change in the temporary survey was permissible.)

No map was required. The construction of the line of railroad was all that was necessary.

Jamestown v. *Jones*, 117 U. S. 628, 44 L. Ed. 698;
Union Pacific v. *City of Greeley*, 189 Fed. 1;

Stuart v. *Union Pacific,* 227 U. S. 342, 57 L. Ed. 535;
City of Reno v. *Southern Pacific,* 268 Fed. 751;
Minn., etc., v. *Doughty,* 208 U. S. 251, 52 L. Ed. 474.

FIFTH PROPOSITION

Petitioners at pages 71 and 72 of their brief attempt to show that the Act of March 8, 1922, 42 Stats. 414, providing for the disposition of abandoned or forfeited railroad rights-of-way, granted by Congress, has no application to the land involved in the Higgins case. The Act is set forth at page 87 of the printed record and the petitioners claim that because the Act provides that the title to the abandoned railroad right of way shall "vest in such municipality, and this by virtue of the patent thereto, and without the necessity of any other or further conveyance or assurance of any kind or nature whatsoever," it can not have any application to the Higgins land because the Higgins land was patented direct to R. W. Higgins, one of the ancestors of petitioners. This portion of the Act has never been construed by any Court, insofar as we have been able to learn, but we believe it is patent that the claim of petitioners is wholly unfounded. Congress, in line with all the decisions of the Supreme Court of the United States, and other Courts where the question has been involved, clearly recognized the title of the United States to all abandoned railroad rights of way where such rights of way were obtained by and through Acts of Congress.

Congress, by this Act, doubtless intended to make full provision as to where the title to such rights of way should vest upon abandonment; and in making this disposition Congress provided in the Act that such abandoned rights

of way in rural communities, should vest in the owner of the property out of which it was carved. And that in municipalities the title to such abandoned rights of way should vest in the municipality in which the right of way was located for park purposes.

There is no escape from the conclusion that there is no possible way by which a private individual can procure title to such an abandoned right of way in a municipality. If the Act of Congress does not apply to the abandoned right of way in the City of Oklahoma City, it is certain that the title thereto still belongs to the United States because it is clear Congress did not make provision for any private individual in a municipality to succeed to such an abandoned right-of-way. On the contrary, the Act itself unmistakably shows that Congress intended for the municipality to succeed to an abandoned right-of-way within its corporate limits.

The contention of Petitioners is a mere play upon words which is neither sound in law nor in fact. It is the intention of law making bodies which govern in the interpretation of their enactments, and the gist of the statute under consideration, stripped of all technicalities, is that the title to an abandoned right-of-way located outside of municipalities shall go to the owner of the property out of which the right-of-way was taken; and in municipalities, the title to such rights of way shall vest in the municipalities, without the necessity of the execution of a patent therefor or other assurance.

While this Act has never been construed, we believe the intent and purpose of it is so plain that there can be no mistake as to what Congress intended. If the technical wording of the clause relied on by petitioners is such that it destroys the applicability of the Act to the situation involved in the instant cases as contended by them, certainly

a court would not be justified in holding that the Petitioners could in anywise reap a benefit therefrom, for in such a situation the title to the abandoned right-of-way would still be vested in the United States free from any claim of Petitioners. They must recover on the strength of their own title and not on the weakness of Respondent's title.

The report of Committee on Public Lands which contains copies of letters from the Secretary of the Interior relating to abandoned Railroad rights-of-way and a statement of the reasons why the Act of March 8, 1922 should be passed, is very illuminating and is set out in full at pages 77-86 of the printed Record.

Also, as further showing the absolute power and control of the United States over all rights of way granted to railroad companies, attention is called to some of the Acts of Congress which had previously been passed. These Acts are set forth in stipulation shown at page 51 of the printed Record, among which is the Norris Act herein before referred to.

Ruff v. *Board of Commissioners* (Kans.) 272 Pac. 189, decided December 8, 1928, is a very illuminating case on the power of Congress over rights of way granted by it. It will be observed that the case reviews a great deal of the legislation enacted by Congress relating to the disposition of rights of way. Under all the authorities Congress is the only body which can authorize the sale or disposition of a right of way granted by it; and the abutting property owners can not be heard to complain, for they have no interest whatsoever in such rights of way, notwithstanding the patent they hold to the land through which the railroad runs may be broad enough in its terms to include the right-of-way.

Of course, since the passage of the Act of March 8, 1922, if the abandoned right of way is in a rural community, it

reverts to the owner of the land out of which it was taken, but if it is within a municipality it goes to the municipality for park purposes.

The Respondent in the instant cases, now holds and uses the land in controversy for public park purposes.

SIXTH PROPOSITION

The decisions of the Supreme Court of the State of Oklahoma in the instant cases are fully sustained by the controlling statutes and authorities.

We believe we have herein before successfully answered every point of contention made by petitioners. In our discussion we have cited and discussed many authorities, all of which we believe to be applicable to the issues in the instant cases; but notwithstanding the great number of authorities cited and discussed, we confidently believe that it can be easily determined by examining certain statutes and authorities we have selected from the great mass, that the opinions of the State Supreme Court in the instant cases could not have been otherwise than as written.

So, in the light of our discussion of other Propositions herein, we have selected and tabulated what we deem to be the governing and controlling treaties, statutes and cases. We list them as follows:

1. Controlling Treaties and Statutes.

Creek and Seminole Treaty of August 7, 1856—11 Stats. 699, 2 Kappler 756, (authorized among other things, granting of Railroad rights of way.)

Creek Treaty of June 14, 1866. 14 Stats. 785, 1 Kap-

pler 931, (ceded all this land to United States and also authorized granting of Railroad rights of way over all Creek lands.)

Creek Treaty of January 19, 1889, and approved by Congress March 1, 1889, 25 Stats. 757, 1 Kappler 321, (ceded all claim and granted unrestricted use to United States.)

Choctaw Railway Act—Passed *Feb.* 18, 1888. 25 Stats. 35, 1 Kappler 256, Amended *Feb.* 13, 1889, 25 Stats. 668, 1 Kappler 311.

Act authorizing opening of Country for Settlement, passed *March* 2, 1889, 25 Stats. 980, 1 Kappler 340.

President's Proclamation Opening Country for Settlement, Issued March 23, 1889—25 Stats. 1544, 1 Kappler 940.

Organic Act—Passed *May* 2, 1890. 26 Stats. 81.

Act of April 24, 1896, Approving construction of Railroad, 29 Stats. 98.

Act of March 8, 1922—Disposing of abandoned railroad Rights of Way. 42 Stats. 414

2. Controlling Cases.

Ruddy v. *Rossi,* 248 U. S. 104, 63 L. Ed. 148;

United States ex rel. Search et al. v. *Choctaw Okla. & Gulf Ry. Co.,* 3 Okla. 404, 41 P. 729;

Stuart v. *Pacific R. R. Co.,* 178 Fed. 753;

Churchill v. *Choctaw Coal & Ry. Co.,* 4 Okla. 462, 46 P. 503;

St. Joseph & Denver R. R. Co. v. *Baldwin,* 103 U. S. 426, 26 L. Ed. 578;

Northern Pacific R. Co. v. *Townsend,* 190 U. S. 267, 47 L. Ed. 1044;

Rio Grande R. R. Co. v. *Stringham,* 239 U. S. 44, 60 L. Ed. 136;

Mackey, County Treasurer, v. *Choctaw Okla. & G. R. Co.,* 256 U. S. 531, 65 L. Ed. 1076;

Bybee v. *Oregon & Cal. R. Co.,* 139 U. S. 663, 35 L. Ed. 305.

Some of the above cases have been declared the law for more than fifty years, and yet there is not a single one of them which has ever been criticised in the slightest degree; on the other hand some of them have been cited with approval and followed scores of times.

In the light of all the authorities, we submit that the opinions of the State Supreme Court contain a true and correct statement of the law.

SUMMARY AND CONCLUSION

We confidently believe that we have successfully shown that the writs prayed for herein should be denied for the following reasons, towit:

1. Because the opinions of the State Supreme Court not only gave full force and effect to all pertinent federal statutes, but are fully sustained by all the controlling statutes and decisions.

2. Because in the Higgins case there is a non-federal question which is sufficient to sustain the decisions of the Supreme Court of the State of Oklahoma insofar as they relate to that case. Said non-federal question being predicated upon the deed executed by R. W. Higgins and wife in 1898, conveying the land in fee simple to the Choctaw Oklahoma and Gulf Railroad Company, the successor of the Choctaw Coal and Railway Company.

3. Because the major portion of the petition and the brief in support thereof is not at all applicable to the Noble case in that the ancestors of the Noble petitioners settled upon the land in controversy with full knowledge of the fact that the Choctaw Coal & Railway Company claimed said particular land for right-of-way purposes.

4. Because it is patent that there is no error in the opinions of the State Supreme Court and that such opinions should be promptly fully approved and affirmed in all particulars.

Respectfully submitted,

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